United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

29-7

751

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROY MORGAN, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 23549
	)	
ROBERT H. FINCH, et al.,	)	
	)	
Defendants-Appellees.	)	

On Appeal from the United States District Court for the District of Columbia

BRIEF OF PLAINTIFFS-APPELLANTS

James M. Johnstone OK
Paul M. Hyman OK
1776 K Street, N.W.
Washington, D. C. 20006

Attorneys for Plaintiffs-Appellants

Ralph J. Temple OK
A.C.L.U. Fund
1424 Sixteenth Street, N.W.
Washington, D. C.

Of Counsel

November 14, 1969

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* Cases principally relied on are marked with asterisks.

Statement of Issues Presented for Review

Whether the United States District Court erred in dismissing "for lack of case or controversy jurisdiction" plaintiffs-appellants' complaint seeking declaratory and injunctive relief from interferences by defendant officials of the Department of Health, Education, and Welfare with the First Amendment rights of plaintiffs to display and distribute written material.

This case has not previously been before this Court.

References to Rulings

Ruling of Judge Pratt during oral argument, September 17, 1969, transcript, pp. 27-28.

STATEMENT OF THE CASE

This is an appeal from an Order of the United States District Court for the District of Columbia, filed September 26, 1969, which dismissed plaintiffs' action "for lack of case or controversy jurisdiction" and further denied plaintiffs' Motion for Preliminary Injunction as "moot". This Court has jurisdiction under 28 U.S.C. §§1291 and 1292.

The Complaint in this case, filed August 4, 1969, sought declaratory and injunctive relief to vindicate the First Amendment rights of plaintiffs Roy Morgan and Local 41 of the American Federation of Government Employees.*/ The verified Complaint (¶¶7-13) detailed actions by defendants Hacker and Hobek, officials of the Department, with the acquiescence of defendant Secretary Finch, interfering with the display and distribution of written materials by Local 41's members in connection with an authorized membership drive in July of this year. This written material questioned by the defendants related to the National Welfare Rights Organization's "Live On A Welfare Budget Week" campaign, in which Local 41 members were participating, and was used by Local 41 to illustrate its role as a "social action union". Cplt. ¶6, Exhs. A, A-1, B.

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*/ Plaintiff Morgan sued in his individual capacity as an HEW employee and in his representative capacity as President and a member of Local 41, AFGE.

As demonstrated by defendants' own written statements, which were attached either to the verified Complaint or to Affidavits filed by plaintiffs in connection with their subsequent Motion for Preliminary Injunction, these interferences by the defendants included written requests to "discontinue distributing the material in question," a statement that "failure to comply with this request will result in serious consideration being given to cancellation of the remainder of your membership drive," a temporary withdrawal of permission to conduct the membership drive, and resumption of the drive only under the condition that distribution of written material be limited only to specifically listed items (not including the controversial NWRO materials), with a requirement to clear any other materials with Messrs. Hacker or Hobek in advance of distribution. Morgan Aff. ¶¶6, 7, 9, 10, Exhs. 2, 3; Cplt. ¶¶8, 9, 12, Exh. C.

The verified Complaint also charged that defendant Hobek had interfered with the display of literature by the plaintiffs "on at least one other occasion," specifically by requiring plaintiffs to remove from a Department bulletin board literature opposing a projected move of certain Department offices to Rockville, Maryland. Cplt. ¶14, Exh. D.

The verified Complaint sought the following relief:

(1) declaratory judgment that plaintiffs and any recognized employee group have the right to display and distribute the NWRO literature and

any other non-obscene literature free from defendants' interference; (2) a permanent injunction barring defendants from interfering with display and distribution of literature; and (3) a mandatory injunction requiring defendants to permit Local 41 to conduct forthwith a 30-day membership drive free of such censorship.

On August 6, 1969, plaintiffs filed a Motion for Preliminary Injunction, supported by the Affidavit of Roy Morgan, which amplified and detailed the charges of the Complaint.

Responding to this Motion on August 14, 1969, defendants did not challenge or contest the allegations of the verified Complaint and the Morgan Affidavit with respect to their interference with the distribution of literature in plaintiffs' membership drive, which was by this time concluded. Instead, defendants filed an affidavit by Bernard Sisco, Deputy Assistant Secretary of Health, Education and Welfare for Administration, which stated in pertinent part:

> "It was not nor is it now the intention of the Secretary through his subordinates to impose any prior restraints or censorship of any kind upon the materials which the officers and members of Local No. 41 distribute or hand out in connection with their current membership drive. Whatever misunderstandings may have existed between the officers, members, and attorneys for Local No. 41, on the one hand, and the officials of the Department of Health, Education, and Welfare, including Messrs. Hacker and Hobek, on the other, the position I have expressed in this affidavit is the official position of the Department of Health, Education, and Welfare insofar as use of literature, pamphlets and other similar materials by the officers and members of Local No. 41 in membership drives is concerned." (¶3).

Mr. Sisco's Affidavit further stated that "the Department imposes no restraint upon the undertaking of the officers and members of Local No. 41 to make distribution" of the three specific items of literature related to the National Welfare Rights Organization, attached as Exhibits A, A-1, and B to plaintiffs' Complaint. He cautioned, however, that the Department "reserves its right to take such action as may be appropriate and consistent with law in the event and to the extent other materials distributed fail to comply with the law and regulations governing such matters."*/

Attached to the Sisco Affidavit as a statement of Department policy was a letter dated July 25, 1969, to plaintiffs' counsel from St. John Barrett, Deputy General Counsel, Department of HEW. This letter stated, inter alia, that:

> "As representatives of this Department have already advised the officials of Local No. 41, certain of the literature which they had been distributing was, in our judgment, outside the purview of the Executive Order regulating such membership drives. The agreement as to which specific items of literature would be considered within the purview of the Executive Order was intended to avoid disputes concerning the relevance of literature to such membership drives. Such understanding,

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*/ In addition to the Sisco Affidavit, defendants filed an Affidavit by Henry F. Hobek, which, in substance, denied that plaintiffs had been "requested or directed" to remove from the Department's bulletin board the notice with respect to the projected move to Rockville described in ¶14 of the Complaint. Mr. Hobek's Affidavit on this point was contested in the Counter-Affidavit of Roy Morgan, filed August 25, 1969.

> however, is certainly not binding upon your clients and if they do not wish to have prior agreement regarding certain items of literature which we consider within the privilege defined by the Executive Order, we have no wish to impose prior submittal of such items to us as a condition for their distribution. If items are distributed which are not in conformance with the Department's regulations and the criteria specified therein for publication and distribution of materials, we shall be required to impose such sanctions as the law and the regulations make available."

Based on the Sisco Affidavit and Barrett letter, defendants argued that the case should be dismissed in its entirety for lack of case or controversy jurisdiction. In this connection, defendants' brief stated that:

> "Again, we represent to this Court that plaintiffs are free to post such union literature as they see fit upon the bulletin boards assigned to them in the Health, Education, and Welfare premises without censorship or imposition of prior restraints by the officers of Health, Education, and Welfare. The Secretary of the Department of Health, Education, and Welfare, just as any ordinary citizen, reserves to himself the right to seek redress in the event the union literature posted is not in compliance with laws and regulations governing such matters." Defendants' Opposition, at 4.

In reply to the defendants, plaintiffs filed a Counter Affidavit of Roy Morgan which pointed out that contrary to Mr. Sisco's Affidavit concerning the "intention" and the "official position" of HEW, "in actual practice these employees [defendants Hacker and Hobek] have consistently insisted on the removal of literature, attempted to impose conditions on the use of literature, requested the submission of literature

for prior approval, and in general acted contrary to what Mr. Sisco now states is the 'intention' or 'policy' of the Department." Morgan Counter Aff. ¶2. In further support of this assertion, and as an illustration of the actual practices of the defendants, the Morgan Counter Affidavit detailed an occasion in March 1969 in which defendant Hobek had insisted that Local 41 remove from its bulletin board a flyer announcing a union meeting in which Mr. Lawrence James, President of Local 206, Social Security Administration, Philadelphia, Pennsylvania, was scheduled to speak. ¶4, Exh. 6. Per the Morgan Counter Affidavit, Mr. Hobek's specific objection to this flyer was that it contained the phrase "right to strike." ¶4.

Plaintiffs' Motion for Preliminary Injunction was argued orally before United States District Judge Pratt on September 17, 1969. In the course of this argument, the District Court made clear that although it agreed that "the criterion of what the department officials in their unilateral judgment think is appropriate" literature for plaintiffs to distribute and display was "obviously" not a proper one for limiting such distribution and display, the statements of Messrs. Barrett and Sisco reduced the controversy to a "misunderstanding." Tr. p. 15.

In short, in the District Court's view, "whatever was said before by Mr. Hobek and the other named defendant, Hacker, that is not the policy of the department; and in those respects, the incidents that you have complained about have been mooted." (Tr. p. 15).

After oral argument, the Court stated that "I am satisfied that the motion for preliminary injunction should be denied because we do not have jurisdiction." Tr. p. 27. As a "further additional ground," the Court stated that "under the criteria of Virginia Petroleum Jobbers and also Quaker Action Group against Hickel, there is nothing before the Court so far as I can see that indicates that there is a threat or the fact of irreparable injury." Tr. p. 28.

The District Court's Order, filed September 26, 1969, recites that "the Court lacks jurisdiction over the matter for the reason that no case or controversy exists between the parties, and it further appearing to the Court that plaintiffs' motion for preliminary injunction is mooted by lack of jurisdiction in the Court," and orders "that this action be and the same hereby is dismissed for lack of case or controversy jurisdiction" and that "plaintiffs' motion [for Preliminary Injunction] be and the same hereby is denied as moot."

This appeal followed.

ARGUMENT

[In connection with this Argument, plaintiffs-appellants desire the Court to read the verified Complaint; Plaintiffs' Motion for Preliminary Injunction, with accompanying Affidavit of Roy Morgan; Counter Affidavit of Roy Morgan; and pages 15, 27-29 of the transcript of the oral argument of September 17, 1969.]

Preliminary Statement

As we shall show herein, the District Court's dismissal of this action for lack of case or controversy jurisdiction was clearly erroneous. Plaintiffs-appellants' complaint stated a valid cause of action, raising important issues of public importance, and defendants' belated protestations that the repeated prior actions of HEW officials in interfering with plaintiffs' First Amendment rights were contrary to Department policy were patently insufficient under the precedents to deprive the District Court of jurisdiction to hear and decide the case on the merits. On the contrary, this case, which is one of three filed against HEW officials between November 1968 and October 1969 seeking to prevent their interference with the First Amendment rights of HEW employees, presented for decision one of the "recurring issues of public interest" which must be considered on the merits by the District Court. Women Strike for Peace v. Hickel, ___ U.S. App. D.C. ___, No. 23,268, (August 1, 1969) Slip. Op., p. 10.

I.

Plaintiffs' Verified Complaint And Affidavits Set Up Meritorious Claims For Relief, Based On Defendants' Denial Of Plaintiffs' Rights Of Free Speech, Which Raised Issues Of Continuing Public Importance.

At this early stage of the case, the plaintiffs' pleadings, including the verified Complaint and plaintiffs' affidavits, clearly present an important issue of Constitutional law and set up claims for relief which require answers from the defendants.

Taking the allegations in the verified Complaint and in plaintiffs' affidavits as true, it appears that Messrs. Hacker and Hobek, with the apparent acquiescence of their superiors, including Mr. Sisco and defendant Finch, took the following actions with respect to plaintiffs' attempts to distribute and display various pieces of literature during 1969:

1. Ordered the James flyer (Morgan Counter Aff. Exh. 6) removed from a bulletin board on which plaintiffs had been authorized to display written material because it contained the phrase "right to strike" (Morgan Counter Aff. ¶4);

2. Ordered a flyer urging employees to join Local 41 so as to fight the impending move of certain Department offices to Rockville removed from the same bulletin because of objections to its content (Cplt. ¶14, Exh. D);

3. Based on their own unilateral view of the "appropriateness" of such material, objected to the distribution during Local 41's authorized membership drive of union-prepared literature relating to the National Welfare Rights Organization "Live On A Welfare Budget Week," withdrew permission to conduct the membership drive when Local 41 refused to bow to their request to cease distributing the literature, and subsequently allowed the drive to continue only after extracting from Local 41's parent union agreement to prior clearance of all literature (Cplt. ¶¶7-13, Exh. A, A-1, B, C; Morgan Aff. ¶¶6-10, Exhs. 2, 3).

Extended argument is scarcely necessary to demonstrate the illegality of these challenged actions, which stand condemned by pertinent precedents. E.g., Los Angeles Teachers Union, Local 1021 v. Los Angeles City Board of Education, 78 Cal. Reptr. 723 (Cal. Sup. Ct. 1969) (Teachers union members have the right to distribute on school premises during off duty hours a petition relating to the financing of public education); Pickering v. Board of Education, 391 U.S. 563, 568 (1968) (Dismissal of public school teacher for criticizing school officials and Board of Education in letter to newspaper reversed); and United States v. Robel, 389 U.S. 258 (1967) (Discharge of defense worker for membership in Communist Party held unconstitutional). Indeed, the District Judge at oral argument recognized that the claimed "inappropriateness" of literature distributed by plaintiffs could not be a proper criterion for defendants to limit or restrain such distribution. Tr. p. 15.

Moreover, recent and related cases make clear that the denial of plaintiffs' rights of free speech by HEW officials may well be part of a pattern of behavior which has resulted in recurring infringements of First Amendment rights by these same officials. See Tabor v. Cohen, ___ U.S. App. D. C. ____, No. 22,512 (November 20, 1968); Reiss v. Finch, ____ U.S. App. D. C. ____, No. 23,543 (October 14, 1969).

In Tabor v. Cohen, supra, this Court was forced to issue an Order preliminarily enjoining the Secretary of HEW from interfering with Michael Tigar's right to speak before a recognized employee group at a regular meeting. Similarly, in Reiss v. Finch, supra, an Order from this Court was required to persuade the Secretary of HEW to permit Dr. Benjamin Spock to speak at the Department in connection with Vietnam Moratorium Day activities by members of plaintiff Local 41 and other groups.

Clearly, the issues of employee free speech presented by this case, and the Tabor and Reiss cases, are the type of "recurring issues of public interest" which this Court has held are not lightly to be mooted by post-complaint events. Women Strike for Peace v. Hickel, ___ U.S. App. D.C. ___, No. 23,268 (August 1, 1969). See also Levy v. McCulloch, No. 2912-69 (D.D.C. 1969) (Challenging efforts by NLRB officials to remove from bulletin board handbills and posters publicizing Vietnam Moratorium Day activities); The Washington Post, October 30, 1969, p. G-9, (reporting

efforts by GSA officials to obtain removal from display in government building of a poster bearing a picture of President Nixon and an antiwar caption).

Accordingly, the District Court's dismissal of this action, without even requiring defendants to answer, was clearly erroneous unless the Sisco Affidavit and Barrett letter were enough to moot the controversy in its entirety. As we show in Point II, however, these belated, self-serving, and equivocal protestations were patently insufficient to accomplish this end.

II.

The Belated "Protestations of Innocence" By HEW Officials Were Insufficient To Moot The Controversy So As To Deprive The District Court Of Jurisdiction To Hear And Decide The Case.

As the Supreme Court has stated, the test for mootness "is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the Courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" U.S. v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 203 (1968).

Thus, although "a case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," self-serving statements by defendants "standing alone, cannot suffice to satisfy the heavy burden of persuasion"

which rests on those seeking to persuade a Court that a controversy is moot. Ibid. (Emphasis added).

Moreover, this burden and its resulting strictures against dismissals for mootness apply even though "it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary." Ibid.

Particularly where Constitutionally guaranteed rights are alleged to have been infringed, there is "a strong obligation on the court to make sure that similar conduct will not recur." In this area, courts have therefore taken a dim view of "protestations of repentance and reform timed to anticipate or to blunt the force of a lawsuit." Lankford v. Gelston, 364 F. 2d 197, 203 (4th Cir. 1966). See also Carroll v. President & Comm'rs of Princess Anne County, 393 U.S. 175, 179 (1968); Cypress v. Newport News General & Nonsectarian Hosp. Ass'n., 375 F. 2d 648, 657 (4th Cir. 1967); Jenkins v. United Gas Corp., 400 F. 2d 28, 33 (5th Cir. 1968).

Measured against these precedents, the Barrett letter and the Sisco Affidavit are manifestly insufficient to oust the jurisdiction of the District Court to decide this case on the merits.

First, the Barrett letter was written on July 25, over three weeks after defendants Hacker and Hobek's conduct was called to the attention of their superiors by plaintiffs without apparent redress (Morgan Aff. ¶7, Exh. 4). Indeed, the Barrett letter was a response to plaintiffs'

announcement that they intended to bring this action, which had included a request to attempt to reach a satisfactory, amicable settlement. Similarly, the Sisco Affidavit was not forthcoming until August 13, 1969, after the Complaint was filed, even though Mr. Sisco had been given notice by plaintiffs as early as July 3, concerning defendants Hacker and Hobek's restrictions on plaintiffs' distribution of literature. (See Morgan Aff., Exh 4).

Manifestly, such "protestations of repentance and reform" after litigation is threatened "cannot suffice to satisfy the heavy burden of persuasion" as to mootness resting upon appellees. Lankford v. Gelston, 364 F. 2d at 203, and U.S. v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. at 203.

Secondly, the Barrett letter and Sisco Affidavit make it a good deal less "absolutely clear" that the "allegedly wrongful behavior" challenged here "could not reasonably be expected to recur." U.S. v. Concentrated Phosphate Export Ass'n, supra. Thus, although the Barrett letter disclaimed any "wish to impose prior submittal of such items to us as a condition for their distribution," it reiterated with apparent approval the positions of Messrs. Hacker and Hobek that the literature concerning the NWRO distributed by Local 41 was "outside the purview of the Executive Order regulating such membership drives." Moreover, the letter specifically

reserved the right to "impose such sanctions as the law and the regulations make available" if "items are distributed which are not in conformance with the Department's regulations and the criteria specified therein for publication and distribution of materials."

Backtracking somewhat from this position, the Sisco Affidavit stated that "the Department imposes no restraint" upon the distribution of those same items of literature relating to the National Welfare Rights Organization which Messrs. Hacker and Hobek had found "inappropriate" and Mr. Barrett had deemed "outside the purview of the Executive Order regulating such membership drives." This apparent reversal of Department position regarding the NWRO literature came too late to reverse the effect of defendants' prior actions. The Sisco Affidavit was sworn to on August 13, 1969, nearly two weeks after plaintiffs had completed their membership drive, and six weeks after the last NWRO activity referred to in the controversial handbills had been completed. Like Mr. Barrett, moreover, Mr. Sisco specifically reserved the "right" of the Department of HEW "to take such actions as may be appropriate and consistent with law in the event and to the extent that other materials distributed fail to comply with the law and regulations governing such matters."

In short, despite the alleged (and for purposes of this appeal admitted) predilections of defendants Hacker and Hobek to interfere with plaintiffs' distribution and display of literature based on their own notions

of "appropriateness" or legality, the Barrett letter and Sisco Affidavit amount to no more than generalized disclaimers of any "intent" to impose prior restraint on plaintiffs' activities. They were "in no sense a recognition that the conduct complained of fell short of established legal standards" and they add nothing to the general rule with which Messrs. Hacker and Hobek should already have been familiar--i.e., that prior restraints based on the content of literature to be distributed within the Department by employees are impermissible. Lankford v. Gelston, 364 F. 2d at 203. See also Freedman v. Maryland, 380 U.S. 51 (1965); Thornhill v. Alabama, 310 U.S. 88 (1940); Near v. Minnesota, 283 U.S. 697 (1931).

Thus, both the timing and the content of the Sisco Affidavit and the Barrett letter render these belated "protestations of repentance and reform" insufficient to moot this case. The District Court's Order of dismissal, which denied plaintiffs any declaratory or injunctive relief before defendants had even been required to answer, was clearly erroneous.

CONCLUSION

For the foregoing reasons, the Order of the District Court insofar as it dismissed this action "for lack of case or controversy jurisdiction," should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

James M. Johnstone

Paul M. Hyman

1776 K Street, N. W.
Washington, D. C. 20006

Attorneys for Plaintiffs

Of Counsel:

Ralph J. Temple
A. C. L. U. Fund
1424 16th Street, N. W.
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Motion for Summary Reversal and Brief of Plaintiffs-Appellants has been made personally upon Joseph M. Hannon, Esq., Assistant United States Attorney, this 14th Day of November, 1969.

Paul M. Hyman

Paul M. Hyman

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term

No. 23,549

Roy Morgan, President, Local 41,
American Federation of Government Employees,

Appellants,

v.

Robert T. Finch, Secretary
Department of Health, Education, and Welfare, et al.,

Appellees.

PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellants respectfully request that a rehearing be granted in this case.

In support of this request appellants respectfully show as follows:

1. This Court's Judgment of April 23, 1970, affirming the decision of the United States District Court for the District of Columbia which dismissed this case, was based on the theory that an affidavit by Bernard Sisco, a subordinate official of the Department of Health, Education, and Welfare, together with representations made by defendants'

counsel at oral argument both in this Court and the District Court, established that there was no present controversy between the parties so that plaintiffs' claims concerning defendants' infringement of plaintiffs' First Amendment rights were moot.

2. At oral argument on April 16, 1970, this Court asked counsel for plaintiffs if he knew of any additional interferences with plaintiffs' First Amendment rights by defendants beyond those presented in the record before the District Court. Counsel replied in the negative, noting that the pendency of this appeal may have had a bearing on defendants' actions.

3. As shown by the attached Affidavit, counsel for plaintiffs was on this date furnished with a copy of HEW Labor-Management Relations Instruction 711-1, a new Departmental instruction establishing policies on labor management relations. Section 711-1-210 of the new instruction states as follows:

> "POSTING AND DISTRIBUTION
>
> Special bulletin boards or space on regular bulletin boards may be made available to a labor organization which has been granted exclusive recognition. Such labor organization may also be permitted to make distribution of labor-management relations matter. Distribution may be made only in non-work areas and during the non-duty time of employees who are distributing or receiving the material. The preparation, posting, and distribution of material will be without cost to the Department."

4. On its face, this new instruction appears to deprive plaintiffs of First Amendment rights which they have hitherto exercised. Specifically, Section 711-1-210 purports to limit labor organizations to the "distribution of labor-management relations matter." Such a restriction clearly relates to the content of material to be distributed and suggests that the censorship activities of the defendants complained of in this case -- which were based on unilateral determinations of what was "appropriate" for plaintiffs to distribute -- may now be revived and indeed given official sanction. Moreover, the new instruction may result in these plaintiffs being deprived of bulletin boards which they currently use in areas of the Department in which they do not have "exclusive recognition", even though other groups, including but not limited to informal employee groups, the Red Cross and the United Givers Fund,are permitted to use departmental bulletin boards. Finally, the new regulation appears to eliminate, as to employee unions subject to its terms, the prior practice of permitting desk-to-desk distribution of written materials.

5. In plaintiffs' view, the restrictions which the new regulation places on the posting and distribution of written materials are contrary to the representations by the defendants which caused this Court to affirm the District Court's dismissal of this case. Further, the

issuance of these new restrictions so promptly after this case was decided demonstrates clearly the defendants' intention and proclivity to limit and curtail the First Amendment rights of these plaintiffs, and underscores plaintiffs' continuing need for the injunctive and declarative relief sought in their complaint.

WHEREFORE, plaintiffs respectfully request a rehearing of this case, or, in the alternative, an immediate reversal and remand of the District Court's order dismissing the case for mootness so that the legality and constitutionality of these new restrictions imposed by Instruction 711-1 may be tested in the context of these defendants' repeated prior interferences with plaintiffs' First Amendment rights.

Respectfully submitted,

James M. Johnstone

Paul M. Hyman

Paul M. Hyman
1776 "K" Street, N.W.
Washington, D.C. 20006

Counsel for Appellants

Of Counsel:
Ralph J. Temple
A.C.L.U. Fund
1424 - 16th Street, N.W.
Washington, D.C.

May 7, 1970.

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term

No. 23,549

Roy Morgan, President, Local 41,
American Federation of Government Employees,

Appellants,

v.

Robert T. Finch, Secretary
Department of Health, Education, and Welfare, et al.,

Appellees.

AFFIDAVIT OF JAMES M. JOHNSTONE

JAMES M. JOHNSTONE, being first duly sworn, deposes and says:

That he is counsel for the plaintiffs, Roy Morgan, et al., in the above-captioned action, and that on May 7, 1970, plaintiff Morgan caused to be delivered to his office a copy of HEW Instruction 711-1 which, Mr. Morgan informed affiant, had either just been or would shortly be issued as official policy of the Department of Health, Education, and Welfare. Attached to this Affidavit is a xerox copy of Instruction 711-1, with attachments, as delivered by Mr. Morgan to affiant.

James M. Johnstone

Subscribed and sworn to before me this 7th day of May, 1970.

Maud I. McGuire

My Commission Expires January 31, 1972

INSTRUCTION 711-1

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

711-1-00 PURPOSE

This Instruction establishes Department policies on labor-management relations under the provisions of Executive Order 11491.

711-1-10 CORRELATION WITH E. O. 11491

Executive Order 11491 established the policies for Labor-Management Relations in the Federal Service. The Order, as supplemented by this Instruction, constitutes the policies for Labor-Management Relations in the Department of Health, Education, and Welfare. Therefore, E. O. 11491 is made a part of this Instruction as Exhibit X711-1-1. The paragraphs making up this Instruction are keyed (by title) to the sections in the Order to which they relate. For this reason, each Instruction paragraph can be read in context only after reading its corresponding section of the Order.

GENERAL PROVISIONS

711-1-20 POLICY

It is the policy of this Department, in the interest of the well-being of all employees and the efficient administration of the Government, to afford employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment. Each operating agency head will ensure that each employee in his agency is advised at least once each year of his rights under the provisions of Executive Order 11491, "Labor-Management Relations in the Federal Service." Where significant numbers of employees have organized and have been granted exclusive recognition, all applicable HEW officials and supervisors are expected to have an affirmative willingness to enter into good faith collective bargaining arrangements. In so doing, such officials should ensure the preservation of all functional rights necessary to efficiently carry out the mission of the Department.

711-1-30 DEFINITIONS

A. Agency Policies and Regulations. Matters published in the Department Staff Manual and through manual issuance systems of operating agencies and their component organizations.

B. Collective Bargaining Official. The management official who is the head of the activity or installation in which the certified bargaining unit is located.

C. Department Labor Relations Officer. The person designated by the Deputy Assistant Secretary for Personnel and Training to serve in the position which has staff responsibility for Labor-Management Relations of the Department.

D. Operating Agency Labor Relations Officer. The person designated by the operating agency head to serve in the position which has staff responsibility for Labor-Management Relations of the operating agency.

E. Local Labor Relations Officer. The person designated by competent operating agency authority to be responsible for the local operation of Labor-Management Relations. Normally, such person should be organizationally located in the operating personnel office which services the area concerned.

(711-1-30 continued)

F. Operating Agency. When used in this Instruction, the term operating agency means one of the following:

1. Office of the Secretary
2. Environmental Health Service
3. Food and Drug Administration
4. Health Services and Mental Health Administration
5. National Institutes of Health
6. Office of Education
7. Social and Rehabilitation Service
8. Social Security Administration
9. Any other organizational entity established in the future at the same organizational level.

G. Component Organization. A constituent organizational element of an operating agency.

H. General Agreement. An initial or basic agreement, and any successor, which establishes certain conditions applicable to the entire bargaining unit.

I. Master Agreement. An initial or basic agreement, and any successor, which establishes certain conditions applicable to the entire bargaining unit, but which is usually not fully complete until implemented by supplemental agreements covering details of operation at a local level or for specific groups of employees.

J. Supplemental Agreement. An agreement negotiated subsequent to a master agreement to cover employees in a part of the larger bargaining unit for whom such separate supplemental agreement is executed to carry out, with local variations, the plan of the master agreement.

711-1-40 APPLICATION

This Instruction shall not apply to any labor organization composed predominantly of non-U.S. citizen employees located at a Department installation which is outside of the United States.

ADMINISTRATION

711-1-50 FEDERAL LABOR RELATIONS COUNCIL

Department instructions which apply to matters coming before the Federal Labor Relations Council are contained in Personnel Instruction 711-2.

711-1-60 FEDERAL SERVICE IMPASSES PANEL

Department instructions which apply to matters coming before the Federal Service Impasses Panel are contained in Personnel Instruction 711-3.

711-1-70 ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS

Department instructions which apply to matters coming before the Assistant Secretary of Labor for Labor-Management Relations are contained in Personnel Instruction 711-4.

RECOGNITION

711-1-80 RECOGNITION IN GENERAL

A labor organization seeking recognition in compliance with section 7(b) of the Order will submit the required documents to the Local Labor Relations Officer.

711-1-90 FORMAL RECOGNITION

No action will be initiated to terminate existing formal recognition of any labor organization without prior consultation and written concurrence of the Head of the Operating Agency or his designee and the Department Labor Relations Officer, and consultation with the labor organization.

711-1-100 NATIONAL CONSULTATION RIGHTS

National consultation rights shall be accorded or terminated only by the Deputy Assistant Secretary for Personnel and Training. Dealings with labor organizations under this form of recognition shall be with the Deputy Assistant Secretary for Personnel and Training and/or the Department Labor Relations Officer.

711-1-110 EXCLUSIVE RECOGNITION

No action will be initiated to terminate exclusive recognition of any labor organization without prior consultation and written concurrence of the Head of the Operating Agency or his designee and the Department Labor Relations Officer.

AGREEMENTS

711-1-120 NEGOTIATION OF AGREEMENTS

A. Scope of Negotiations. Designated management officials will have the full range of authority to consult and negotiate on all matters which are subject to the administrative discretion of the Collective Bargaining Official whom they represent.

(711-1-120 continued)

B. Types of Agreements. Most agreements will be general agreements. A general agreement may provide for mutual reopening to make additions or other modifications; however, unilateral reopening by either party is prohibited. Any addition or modification to an approved general agreement will become an integral part of such agreement; supplemental agreements are prohibited. A master agreement will be used only in a bargaining unit which covers: (1) a council or group of labor organizations, and/or (2) an organization of the operating agency which is geographically dispersed. Each master agreement must specifically state whether or not supplemental agreements may be negotiated. A master agreement which permits supplemental agreements must also provide procedures for interpretation of such master agreement in accordance with Section 11(c)(1) of the Order. A master agreement and any supplemental agreement under it may provide for mutual reopening, but unilateral reopening is prohibited.

711-1-130 ARBITRATION OF GRIEVANCES

If negotiated agreements provide for arbitration of grievances and disputes, such procedures must ensure that only one hearing is conducted. Therefore, provision shall be made that the employee (or the union in dispute over interpretation and application of an agreement) must elect either a hearing under the grievance procedure or a hearing before an arbitrator. In the latter case, in addition to sharing the cost of the arbitrator, the parties will also share the cost of any transcription of the hearing and the cost for any non-government facilities used for the hearing.

711-1-140 APPROVAL OF AGREEMENTS

A. General. Any written agreement, including those enumerated in the last sentence of Section 12 of the Order, requires approval. The original of the agreement will be retained at the local negotiating level; only copies will be forwarded for approval action. Agreements will be approved by the Deputy Assistant Secretary for Personnel and Training in letter form which will not become a part of the agreement. The Collective Bargaining Official shall be the highest management signatory of an agreement.

(711-1-140 continued)

B. Responsibilities.

1. The Local Labor Relations Officer will forward by Certified Mail, return receipt requested, copies of the signed negotiated agreement simultaneously to the Department Labor Relations Officer, the Operating Agency Labor Relations Officer, and the head of any other component organization which may have issued policies or regulations that are controlling over the agreement.

2. The Head of a Component Organization will require the agreement to be reviewed for conformance with policies and regulations published at his level, and he will forward his written findings of such review to the Department Labor Relations Officer no later than the 10th day after the copy of the agreement was received by him. He will also forward a copy of his findings simultaneously to the Operating Agency Labor Relations Officer.

3. The Head of the Operating Agency will require the agreement to be reviewed for conformance with policies and regulations published at his level, and he will forward his written findings of such review to the Department Labor Relations Officer no later than the 15th day after the copy of the agreement was received by the Operating Agency Labor Relations Officer.

4. The Deputy Assistant Secretary for Personnel and Training will require the agreement to be reviewed for conformance with applicable laws, regulations of other appropriate authorities outside the Department, and the Department Staff Manual. Not later than the 30th day after the copy of the agreement was received by the Department Labor Relations Officer, the Deputy Assistant Secretary for Personnel and Training will issue either his letter of approval, or a letter withholding approval which cites specific violations of policies and regulations.

C. Effective Date of Agreements. An agreement is effective on the date of the approval letter issued by the Deputy Assistant Secretary for Personnel and Training. If he fails to act within the 30-day time limit required in subparagraph B4, the agreement automatically becomes effective on the 31st day after the copy of the agreement was received by the Department Labor Relations Officer, subject only to the requirements of Section 12(a) of the Order.

NEGOTIATION DISPUTES AND IMPASSES

711-1-150 NEGOTIATION DISPUTES

A. No management official shall refer a negotiation dispute to any third party outside the Department, or accept mediation assistance from the Federal Mediation and Conciliation Service until the Deputy Assistant Secretary for Personnel and Training, or his designee, has had an opportunity to review the matter and consult with the national office of the union.

B. Department instructions which apply to the utilization of mediation assistance of the Federal Mediation and Conciliation Service are contained in Personnel Instruction 711-5.

711-1-160 NEGOTIATION IMPASSES

Management may not request the Federal Service Impasses Panel to consider any impasse without prior consultation and written concurrence of the Head of the Operating Agency, or his designee, and the Deputy Assistant Secretary for Personnel and Training, or his designee.

CONDUCT OF LABOR ORGANIZATIONS AND MANAGEMENT

711-1-170 UNFAIR LABOR PRACTICES

Instructions to be followed in the filing and processing of unfair labor practices are contained in Personnel Instruction 711-4.

MISCELLANEOUS PROVISIONS

711-1-180 USE OF OFFICIAL TIME

Employees who perform as representatives of labor organizations are Federal employees and as such are expected to accomplish the duties assigned to them. They will be permitted a reasonable amount of time to prepare and present identifiable grievances, appeals, and other representations. Additionally, management may negotiate with a labor organization reasonable amounts of time that the union may need to carry out other representation responsibilities to members of the bargaining unit. However, such time, since its purpose need not be identified, should normally be a very small percentage of each representative's time.

711-1-190 ALLOTMENT OF DUES

Arrangements for the allotment of dues for a labor organization will be in accordance with the provisions of Federal Personnel Manual Chapter 550, Subchapter 3, as supplemented by Department Personnel Instruction 550-2.

711-1-200 AGENCY IMPLEMENTATION

Provisions of this Instruction are written only in those areas where the Department must take some action, or where elaboration upon Executive Order 11491 is desirable and necessary. In many cases there is neither a need nor a desire for the Department to establish a mandatory Department-wide practice. Therefore, unless and until instructions to the contrary are issued in Department Personnel Instruction Chapter 711, each operating agency is expected to exercise these options.

711-1-210 POSTING AND DISTRIBUTION

Special bulletin boards or space on regular bulletin boards may be made available to a labor organization which has been granted exclusive recognition. Such labor organization may also be permitted to make distribution of labor-management relations matter. Distribution may be made only in non-work areas and during the non-duty time of employees who are distributing or receiving the material. The preparation, posting, and distribution of material will be without cost to the Department.

711-1-220 MEMBERSHIP DRIVES

A request for permission to conduct a membership drive will be in writing and submitted by the labor organization to the personnel officer who services the particular location where the drive is to be conducted. Such request should contain proposed specific dates, times, locations, and areas within such locations, for the conduct of the drive. A membership drive may be conducted only in non-work areas and during the non-duty time of employees who are soliciting or being solicited for membership. While space and reasonable furniture needs may be provided if available, the membership drive will otherwise be without cost to the Department.

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

WHEREAS the public interest requires high standards of employee performance and the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and

WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and

WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and

WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees.

GENERAL PROVISIONS

Section 1. Policy. (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization.

(b) Paragraph (a) of this section does not authorize participation in the management of a labor organization or acting as a representative of such an organization by a supervisor, except as provided in section 24 of this Order, or by an employee when the participation or activity would result in a conflict or apparent conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

Sec. 2. Definitions. When used in this Order, the term --

(a) "Agency" means an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office;

(b) "Employee" means an employee of an agency and an employee of a nonappropriated fund instrumentality of the United States but does not include, for the purpose of formal or exclusive recognition or national consultation rights, a supervisor, except as provided in section 24 of this Order;

(c) "Supervisor" means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

(d) "Guard" means an employee assigned to enforce against employees and other persons rules to protect agency property or the safety of persons on agency premises, or to maintain law and order in areas or facilities under Government control;

(e) "Labor organization" means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees; but does not include an organization which --

(1) consists of management officials or supervisors, except as provided in section 24 of this Order;

(2) asserts the right to strike against the Government of the United States or any agency thereof, or to assist or participate in such a strike, or imposes a duty or obligation to conduct, assist or participate in such a strike;

(3) advocates the overthrow of the constitutional form of government in the United States; or

(4) discriminates with regard to the terms or conditions of membership because of race, color, creed, sex, age, or national origin;

(f) "Agency management" means the agency head and all management officials, supervisors, and other representatives of management having authority to act for the agency on any matters relating to the implementation of the agency labor-management relations program established under this Order;

(g) "Council" means the Federal Labor Relations Council established by this Order;

(h) "Panel" means the Federal Service Impasses Panel established by this Order; and

(i) "Assistant Secretary" means the Assistant Secretary of Labor for Labor-Management Relations.

Sec. 3. Application. (a) This Order applies to all employees and agencies in the executive branch, except as provided in paragraphs (b), (c) and (d) of this section.

(b) This Order (except section 22) does not apply to --

(1) the Federal Bureau of Investigation;

(2) the Central Intelligence Agency;

(3) any other agency, or office, bureau, or entity within an agency, which has as a primary function intelligence, investigative, or security work, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with national security requirements and considerations; or

(4) any office, bureau or entity within an agency which has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties, when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the intemal security of the agency.

(c) The head of an agency may, in his sole judgment, suspend any provision of this Order (except section 22) with respect to any agency installation or activity located outside the United States, when he determines that this is necessary in the national interest, subject to the conditions he prescribes.

(d) Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees.

ADMINISTRATION

Sec. 4. Federal Labor Relations Council. (a) There is hereby established the Federal Labor Relations Council, which consists of the Chairman of the Civil Service Commission, who shall be chairman of the Council, the Secretary of Labor, an official of the Executive Office of the President, and such other officials of the executive branch as the President may designate from time to time. The Civil Service Commission shall provide services and staff assistance to the Council to the extent authorized by law.

(b) The Council shall administer and interpret this Order, decide major policy issues, prescribe regulations, and from time to time, report and make recommendations to the President.

(c) The Council may consider, subject to its regulations --

(1) appeals from decisions of the Assistant Secretary issued pursuant to section 6 of this Order;

(2) appeals on negotiability issues as provided in section 11 (c) of this Order;

(3) exceptions to arbitration awards; and

(4) other matters it deems appropriate to assure the effectuation of the purposes of this Order.

Sec. 5. Federal Service Impasses Panel. (a) There is hereby established the Federal Service Impasses Panel as an agency within the Council. The Panel consists of at least three members appointed by the President, one of whom he designates as chairman. The Council shall provide the services and staff assistance needed by the Panel.

(b) The Panel may consider negotiation impasses as provided in section 17 of this Order and may take any action it considers necessary to settle an impasse.

(c) The Panel shall prescribe regulations needed to administer its function under this Order.

Sec. 6. Assistant Secretary of Labor for Labor-Management Relations. (a) The Assistant Secretary shall --

(1) decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration;

(2) supervise elections to determine whether a labor organization is the choice of a majority of the employees in an appropriate unit as their exclusive representative, and certify the results;

(3) decide questions as to the eligibility of labor organizations for national consultation rights under criteria prescribed by the Council; and

(4) except as provided in section 19(d) of this Order, decide complaints of alleged unfair labor practices and alleged violations of the standards of conduct for labor organizations.

(b) In any matters arising under paragraph (a) of this section, the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order.

(c) In performing the duties imposed on him by this section, the Assistant Secretary may request and use the services and assistance of employees of other agencies in accordance with section 1 of the Act of March 4, 1915, (38 Stat. 1084, as amended; 31 U.S.C. §686).

(d) The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order.

(e) If any matters arising under paragraph (a) of this section involve the Department of Labor, the duties of the Assistant Secretary described in paragraphs (a) and (b) of this section shall be performed by a member of the Civil Service Commission designated by the Chairman of the Commission.

RECOGNITION

Sec. 7. Recognition in general. (a) An agency shall accord exclusive recognition or national consultation rights at the request of a labor organization which meets the requirements for the recognition or consultation rights under this Order.

(b) A labor organization seeking recognition shall submit to the agency a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives.

(c) When recognition of a labor organization has been accorded, the recognition continues as long as the organization continues to meet the requirements of this Order applicable to that recognition, except that this section does not require an election to determine whether an organization should become, or continue to be recognized as, exclusive representative of the employees in any unit or subdivision thereof within 12 months after a prior valid election with respect to such unit.

(d) Recognition, in whatever form accorded, does not –

(1) preclude an employee, regardless of whether he is a member of a labor organization, from bringing matters of personal concern to the attention of appropriate officials under applicable law, rule, regulations, or established agency policy; or from choosing his own representative in a grievance or appellate action;

(2) preclude or restrict consultations and dealings between an agency and a veterans organization with respect to matters of particular interest to employees with veterans preference; or

(3) preclude an agency from consulting or dealing with a religious, social, fraternal, or other lawful association, not qualified as a labor organization, with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members.

Consultations and dealings under subparagraph (3) of this paragraph shall be so limited that they do not assume the character of formal consultation on matters of general employee-management policy, except as provided in paragraph (e) of this section, or extend to areas where recognition of the interests of one employee group may result in discrimination against or injury to the interests of other employees.

(e) An agency shall establish a system for intra-management communication and consultation with its supervisors or associations of supervisors. The communications and consultations shall have as their purposes the improvement of agency operations, the improvement of working conditions of supervisors, the exchange of information, the improvement of managerial effectiveness, and the establishment of policies that best serve the public interest in accomplishing the mission of the agency.

(f) Informal recognition shall not be accorded after the date of this Order.

Sec. 8 Formal Recognition. (a) Formal recognition, including formal recognition at the national level, shall not be accorded after the date of this Order.

(b) An agency shall continue any formal recognition, including formal recognition at the national level, accorded a labor organization before the date of this Order until –

(1) the labor organization ceases to be eligible under this Order for formal recognition so accorded;

(2) a labor organization is accorded exclusive recognition as representative of employees in the unit to which the formal recognition applies; or

(3) the formal recognition is terminated under regulations prescribed by the Federal Labor Relations Council.

(c) When a labor organization holds formal recognition, it is the representative of its members in a unit as defined by the agency when recognition was accorded. The agency, through appropriate officials, shall consult with representatives of the organization from time to time in the formulation and implementation of personnel policies and practices, and matters affecting working conditions that affect members of the organization in the unit to which the formal recognition applies. The organization is entitled from time to time to raise such matters for discussion with appropriate officials and at all times to present its views thereon in writing. The agency is not required to consult with the labor organization on any matter on which it would not be required to meet and confer if the labor organization were entitled to exclusive recognition.

Sec. 9. National consultation rights. (a) An agency shall accord national consultation rights to a labor organization which qualifies under criteria established by the Federal Labor Relations Council as the representative of a substantial number of employees of the agency. National consultation rights shall not be accorded for any unit where a labor organization already holds exclusive recognition at the national level for that unit. The granting of national consultation rights does not preclude an agency from appropriate dealings at the national level with other organizations on matters affecting their members. An agency shall terminate national consultation rights when the labor organization ceases to qualify under the established criteria.

(b) When a labor organization has been accorded national consultation rights, the agency, through appropriate officials, shall notify representatives of the organization of proposed substantive changes in personnel policies that affect employees it represents and provide an opportunity for the organization to comment on the proposed changes. The labor organization may suggest changes in the agency's personnel policies and have its views carefully considered. It may confer in person at reasonable times, on request, with appropriate officials on personnel policy matters, and at all times present its views thereon in writing. An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition.

(c) Questions as to the eligibility of labor organizations for national consultation rights may be referred to the Assistant Secretary for decision.

Sec. 10. Exclusive recognition. (a) An agency shall accord exclusive recognition to a labor organization when the organization has been selected, in a secret ballot election, by a majority of the employees in an appropriate unit as their representative.

(b) A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations. A unit shall not be established solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be established if it includes –

(1) any management official or supervisor, except as provided in section 24;

(2) an employee engaged in Federal personnel work in other than a purely clerical capacity;

(3) any guard together with other employees; or

(4) both professional and nonprofessional employees, unless a majority of the professional employees vote for inclusion in the unit.

Questions as to the appropriate unit and related issues may be referred to the Assistant Secretary for decision.

(c) An agency shall not accord exclusive recognition to a labor organization as the representative of employees in a unit of guards if the organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(d) All elections shall be conducted under the supervision of the Assistant Secretary, or persons designated by him, and shall be by secret ballot. Each employee eligible to vote shall be

provided the opportunity to choose the labor organization he wishes to represent him, from among those on the ballot, or "no union." Elections may be held to determine whether --

(1) a labor organization should be recognized as the exclusive representative of employees in a unit;

(2) a labor organization should replace another labor organization as the exclusive representative; or

(3) a labor organization should cease to be the exclusive representative.

(e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

AGREEMENTS

Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

(c) If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows:

(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

(3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final;

(4) A labor organization may appeal to the Council for a decision when --

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order.

Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements –

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level;

(b) management officials of the agency retain the right, in accordance with applicable laws and regulations –

(1) to direct employees of the agency;

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;

(3) to relieve employees from duties because of lack of work or for other legitimate reasons;

(4) to maintain the efficiency of the Government operations entrusted to them;

(5) to determine the methods, means, and personnel by which such operations are to be conducted; and

(6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency; and

(c) nothing in the agreement shall require an employee to become or to remain a member of a labor organization, or to pay money to the organization except pursuant to a voluntary, written authorization by a member for the payment of dues through payroll deductions.
The requirements of this section shall be expressly stated in the initial or basic agreement and apply to all supplemental, implementing, subsidiary, or informal agreements between the agency and the organization.

Sec. 13. Grievance procedures. An agreement with a labor organization which is the exclusive representative of employees in an appropriate unit may provide procedures, applicable only to employees in the unit, for the consideration of employee grievances and of disputes over the interpretation and application of agreements. The procedure for consideration of employee grievances shall meet the requirements for negotiated grievance procedures established by the Civil Service Commission. A negotiated employee grievance procedure which conforms to this section, to applicable laws, and to regulations of the Civil Service Commission and the agency is the exclusive procedure available to employees in the unit when the agreement so provides.

Sec. 14. Arbitration of grievances. (a) Negotiated procedures may provide for the arbitration of employee grievances and of disputes over the interpretation or application of existing agreements. Negotiated procedures may not extend arbitration to changes or proposed changes in agreements or agency policy. Such procedures shall provide for the invoking of arbitration only with the approval of the labor organization that has exclusive recognition and, in the case of an employee grievance, only with the approval of the employee. The costs of the arbitrator shall be shared equally by the parties.

(b) Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council.

Sec. 15. Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved if it conforms to applicable laws,

existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations.

NEGOTIATION DISPUTES AND IMPASSES

Sec. 16. Negotiation disputes. The Federal Mediation and Conciliation Service shall provide services and assistance to Federal agencies and labor organizations in the resolution of negotiation disputes. The Service shall determine under what circumstances and in what manner it shall proffer its services.

Sec. 17. Negotiation impasses. When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the Federal Service Impasses Panel to consider the matter. The Panel, in its discretion and under the regulations it prescribes, may consider the matter and may recommend procedures to the parties for the resolution of the impasse or may settle the impasse by appropriate action. Arbitration or third-party fact finding with recommendations to assist in the resolution of an impasse may be used by the parties only when authorized or directed by the Panel.

CONDUCT OF LABOR ORGANIZATIONS AND MANAGEMENT

Sec. 18. Standards of conduct for labor organizations.

(a) An agency shall accord recognition only to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in paragraph (b) of this section, an organization is not required to prove that it has the required freedom when it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated or in which it participates, containing explicit and detailed provisions to which it subscribes calling for —

(1) the maintenance of democratic procedures and practices, including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participation in the affairs of the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary proceedings;

(2) the exclusion from office in the organization of persons affiliated with Communist or other totalitarian movements and persons identified with corrupt influences;

(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provision for accounting and financial controls and regular financial reports or summaries to be made available to members.

(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in paragraph (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles when there is reasonable cause to believe that —

(1) the organization has been suspended or expelled from or is subject to other sanction by a parent labor organization or federation of organizations with which it had been affiliated because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by paragraph (a) of this section; or

(2) the organization is in fact subject to influences that would preclude recognition under this Order.

(c) A labor organization which has or seeks recognition as a representative of employees under this Order shall file financial and other reports, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

(d) The Assistant Secretary shall prescribe the regulations needed to effectuate this section. These regulations shall conform generally to the principles applied to unions in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary.

Sec. 19. Unfair labor practices. (a) Agency management shall not --

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;

(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status;

(4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order;

(5) refuse to accord appropriate recognition to a labor organization qualified for such recognition; or

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

(b) A labor organization shall not --

(1) interfere with, restrain, or coerce an employee in the exercise of his rights assured by this Order;

(2) attempt to induce agency management to coerce an employee in the exercise of his rights under this Order;

(3) coerce, attempt to coerce, or discipline, fine, or take other economic sanction against a member of the organization as punishment or reprisal for, or for the purpose of hindering or impeding his work performance, his productivity, or the discharge of his duties owed as an officer or employee of the United States;

(4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it;

(5) discriminate against an employee with regard to the terms or conditions of membership because of race, color, creed, sex, age, or national origin; or

(6) refuse to consult, confer, or negotiate with an agency as required by this Order.

(c) A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for failure to meet reasonable occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order.

(d) When the issue in a complaint of an alleged violation of paragraph (a)(1), (2), or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint. All other complaints of alleged violations of this

section initiated by an employee, an agency, or a labor organization, that cannot be resolved by the parties, shall be filed with the Assistant Secretary.

MISCELLANEOUS PROVISIONS

Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management.

Sec. 21. Allotment of dues. (a) When a labor organization holds formal or exclusive recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provision for the employee to revoke his authorization at stated six-month intervals. Such an allotment terminates when –

(1) the dues withholding agreement between the agency and the labor organization is terminated or ceases to be applicable to the employee; or

(2) the employee has been suspended or expelled from the labor organization.

(b) An agency may deduct the regular and periodic dues of an association of management officials or supervisors from the pay of members of the association who make a voluntary allotment for that purpose, and shall recover the costs of making the deductions, when the agency and the association agree in writing to this course of action. Such an allotment is subject to the regulations of the Civil Service Commission.

Sec. 22. Adverse action appeals. The head of each agency, in accordance with the provisions of this Order and regulations prescribed by the Civil Service Commission, shall extend to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligibles under sections 7511-7512 of title 5 of the United States Code. Each employee in the competitive service shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be processed in an identical manner to that provided for appeals under section 7701 of title 5 of the United States Code. Any recommendation by the Civil Service Commission submitted to the head of an agency on the basis of an appeal by an employee in the competitive service shall be complied with by the head of the agency.

Sec. 23. Agency implementation. No later than April 1, 1970, each agency shall issue appropriate policies and regulations consistent with this Order for its implementation. This includes but is not limited to a clear statement of the rights of its employees under this Order; procedures with respect to recognition of labor organizations, determination of appropriate units, consultation and negotiation with labor organizations, approval of agreements, mediation, and impasse resolution; policies with respect to the use of agency facilities by labor organizations; and policies and practices regarding consultation with other organizations and associations and individual employees. Insofar as practicable, agencies shall consult with representatives of labor organizations in the formulation of these policies and regulations, other than those for the implementation of section 7(e) of this Order.

Sec. 24. Savings clauses. (a) This Order does not preclude –

(1) the renewal or continuation of a lawful agreement between an agency and a representative of its employees entered into before the effective date of Executive Order No. 10988 (January 17, 1962); or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally repre-

sent the management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the date of this Order.

(b) All grants of informal recognition under Executive Order No. 10988 terminate on July 1, 1970.

(c) All grants of formal recognition under Executive Order No. 10988 terminate under regulations which the Federal Labor Relations Council shall issue before October 1, 1970.

(d) By not later than December 31, 1970, all supervisors shall be excluded from units of formal and exclusive recognition and from coverage by negotiated agreements, except as provided in paragraph (a) of this section.

Sec. 25. Guidance, training, review and information.

(a) The Civil Service Commission shall establish and maintain a program for the guidance of agencies on labor-management relations in the Federal service; provide technical advice and information to agencies; assist in the development of programs for training agency personnel and management officials in labor-management relations; continuously review the operation of the Federal labor-management relations program to assist in assuring adherence to its provisions and merit system requirements; and, from time to time, report to the Council on the state of the program with any recommendations for its improvement.

(b) The Department of Labor and the Civil Service Commission shall develop programs for the collection and dissemination of information appropriate to the needs of agencies, organizations and the public.

Sec. 26. Effective date. This Order is effective on January 1, 1970 except sections 7(f) and 8 which are effective immediately. Effective January 1, 1970, Executive Order No. 10988 and the President's Memorandum of May 21, 1963, entitled Standards of Conduct for Employee Organizations and Code of Fair Labor Practices, are revoked.

RICHARD NIXON

THE WHITE HOUSE

October 29, 1969

INSTRUCTION 711-2
MATTERS WHICH COME BEFORE THE FEDERAL LABOR RELATIONS COUNCIL

711-2-00 PURPOSE

This Instruction establishes Department policies on matters which come before the Federal Labor Relations Council.

711-2-10 REPRESENTATION BEFORE THE COUNCIL

Pending the issuance of regulations by the Federal Labor Relations Council, matters for consideration by the Council shall be referred only by the Deputy Assistant Secretary for Personnel and Training.

INSTRUCTION 711-3
MATTERS WHICH COME BEFORE THE FEDERAL SERVICE IMPASSES PANEL

711-3-00 PURPOSE

This Instruction establishes Department policies on matters which come before the Federal Service Impasses Panel.

711-3-10 REPRESENTATION BEFORE THE PANEL

Pending the issuance of regulations by the Federal Service Impasses Panel, negotiation impasses for consideration of the Panel shall be referred only by the Deputy Assistant Secretary for Personnel and Training.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Petition for Rehearing with accompanying Affidavit of James M. Johnstone and attachments has been made by hand delivering a copy to the office of Joseph M. Hannon, Esq., Assistant United States Attorney, this 7th day of May, 1970.

James M. Johnstone